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November 11, 2011

BY ECF

The Honorable James Orenstein
United States Magistrate Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Room 1227 South
Brooklyn, New York 11201

Re: In re Payment Card Interchange Fee and Merchant Discount
Antitrust Litigation, 05-MD-1720(JG)(JO)

Dear Magistrate Judge Orenstein:

During the November 2, 2011 oral argument on defendants' *Daubert* motion directed at the damages opinion of individual plaintiffs' expert Dr. Christopher Vellturo, Your Honor asked whether under the Settlement Agreements in *In re Visa Check/MasterMoney Antitrust Litigation* there is a remedy within the breach provisions that provides for the suppression of evidence. (*See* Nov. 2, 2011 Hr'g Tr. at 53:21-55:13.) While there is no specific provision addressing the suppression of evidence, paragraph forty-two of the MasterCard Settlement Agreement, which also applies under the Visa Settlement Agreement through its most favored nations clause, covers a party's breach of its obligations under the agreement and the Court's role in remedying a breach. In relevant part, paragraph forty-two reads: "In the event that any party does not fulfill any of its obligations under the Settlement Agreement, . . . MasterCard may seek from the Court any and all relief [it] believe[s] appropriate." (*See* MasterCard Settlement Agreement ¶ 42 (attached as Ex. 248 to the Transmittal Decl. of Peter E. Greene, Feb. 11, 2011 "Greene Decl."); Visa Settlement Agreement ¶ 30 (Greene Decl. Ex. 249).)

Your Honor also asked whether, during Dr. Vellturo's deposition, defendants asked him the same questions regarding merchants' behavior in the no surcharge states that defendants pose on pages 9-10 of defendants' opening brief in support their motion to exclude Dr. Vellturo's damages opinion. (Nov. 2, 2011 Hr'g Tr. at 50:7-15.) Those specific questions were not asked. Rather, defendants asked Dr.

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Vellturo what analysis supported his view that the extent of damages would not change notwithstanding these states' prohibitions on surcharging. Dr. Vellturo responded that merchants would instead have discounted at the point of sale, which may have prompted the introduction of new cards and products. (*See* Vellturo Dep. Tr. 124:10-125:13 (attached as Ex. 45 to the Transmittal Decl. of Matthew Freimuth, Feb. 11, 2011).)

Please let us know if we can provide you with any further information.

Respectfully submitted,

/s/ Gary R. Carney

Gary R. Carney

cc: All counsel of record by ECF